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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EUGENE SINOHUE, Defendant and Appellant.	B261638 (Los Angeles County Super. Ct. No. LA063843)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Modified and, as so modified, affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul R. Roadarmel and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Eugene Sinohue was convicted of three counts of committing a lewd act upon a child under the age of 14 and two counts of continuous sexual abuse of a child under 14. We affirmed his convictions, but vacated the sentence on one of the continuous sexual abuse charges and remanded for resentencing on that count. Sinohue challenges the sentence imposed on remand, and contends the trial court failed to calculate his custody credits. The People request that we order various clerical errors in the abstract of judgment corrected. We modify the judgment to reflect the sentence orally imposed by the trial court and to correct the custody credit award, and order corrections to the abstract of judgment. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*[1]

In 1998, Sinohue's second cousin, J.K., was 12 years old. J.K.'s family spent annual vacations with relatives, including Sinohue, in the Los Angeles area. In 1998, J.K. spent two weeks with Sinohue at Sinohue's condominium. The two showered together and slept in the same bed. Sinohue showed J.K. pornography and sexually molested him. Among other things, he fondled J.K.'s penis, rubbed his penis against J.K.'s buttocks, and placed his penis in J.K.'s anus. Shortly after J.K. returned to northern California, Sinohue moved nearby to live with J.K.'s grandmother. He began babysitting J.K. and J.K.'s sister on a daily basis. Between September 1998 and May 1999, Sinohue sexually molested J.K. approximately once or twice a week; he also showed J.K. pornographic movies and magazines. During this period, Sinohue gave J.K. things he would not otherwise have had, including clothing and video games, and took J.K. out to meals in restaurants. In the spring of 1999, J.K.'s mother became concerned that Sinohue was a bad influence on J.K. and told him not to contact her children. Sinohue nonetheless kept in contact with J.K.

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[1] We briefly summarize the facts as set forth in our unpublished opinion in Sinohue's original appeal. (*People v. Sinohue* (Apr. 15, 2014, B237301) [nonpub. opn.].) We take judicial notice of our opinion, as well as of the record in Sinohue's original appeal. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

Between 2003 and 2009, Sinohue sexually molested another victim, D.L., who was Sinohue's girlfriend's nephew. D.L.'s family treated Sinohue like a family member. Sinohue purchased expensive items for D.L., such as a cellular telephone and a flat screen television, and the two spent a great deal of time together visiting amusement parks, playing video games, and riding in Sinohue's airplane, among other things. Sinohue began molesting D.L. in 2003 or 2004, when D.L. was six or seven years old. The molestation included sexual fondling, masturbation, oral copulation and attempted anal penetration. Sinohue also showed D.L. pornography. He told D.L. that these activities were "our secret" and that he would go to jail if D.L. told. D.L. accompanied his aunt and Sinohue on a trip to Hawaii in the summer of 2009, where Sinohue continued to sexually abuse D.L. D.L. did not report the abuse because although he felt the touching was "weird," he loved Sinohue. Eventually D.L.'s parents began limiting Sinohue's contact with D.L. and in October 2009, D.L.'s father obtained a restraining order against him. Other family members and close family friends expressed concern that Sinohue's relationship with D.L. was unusual.

J.K. became acquainted with D.L. when his family visited Los Angeles; he noticed that Sinohue was treating D.L. the same way he had treated J.K. Concerned, J.K. told a family friend to keep Sinohue away from his children. Thereafter, both D.L. and J.K. disclosed that Sinohue had molested them.

2. *Procedure*

a. *Trial and original sentence*

The jury found Sinohue guilty of five counts: three counts of committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a),[2] counts 1, 3, and 4), and continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a), counts 2 and 5.) The jury further found that Sinohue had substantial sexual contact with both victims (§ 1203.066, subd. (a)(8)) and found true a multiple victim allegation. (§ 667.61.) As to the offenses against J.K. (counts 3, 4, and 5), the jury found Sinohue

[2] All further undesignated statutory references are to the Penal Code.

used obscene matter or matter depicting sexual conduct in commission of the offenses (§ 1203.066, subd. (a)(9)). The trial court sentenced Sinohue on all counts under the "One Strike" law (§ 667.61) to a term of 30 years in prison, configured as follows: on count 2, 15 years to life; on count 5, 15 years to life, to be served consecutive to the sentence in count 2; and on counts 1, 3, and 4, concurrent terms of 15 years to life.

b. *Sinohue's first appeal*

Sinohue appealed. We affirmed his convictions in an unpublished opinion. (*People v. Sinohue* (Apr. 15, 2014, B237301) [nonpub. opn.].) However, we vacated the sentence imposed on count 5, continuous sexual abuse of J.K. in violation of section 288.5. In 1998 and 1999, when Sinohue committed the offense, violation of section 288.5 was not listed in section 667.61 as an offense subject to One Strike sentencing.[3] Instead, the offense was punishable by 6, 12, or 16 years in prison. (See § 288.5, subd. (a).) We remanded for resentencing.

c. *Proceedings on remand and appeal*

On remand, Sinohue argued that (1) he was eligible for probation on count 5 pursuant to former section 1203.066; (2) if the trial court denied probation, it should order the sentence in count 5 to run concurrently to that imposed on count 2; and (3) a low term sentence was appropriate. The trial court declined to order probation on count 5 as the defense requested. Instead, it sentenced Sinohue to the determinate high term of 16 years on count 5, to be served consecutively to the term imposed on count 2. It did not alter the sentence originally imposed on the remaining four counts. Sinohue filed a timely notice of appeal.

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[3] An amendment that took effect on September 20, 2006 added the offense of continuous sexual abuse of a child to the list of offenses subject to the One Strike law. (Stats. 2006, ch. 337, § 33.)

DISCUSSION

1. *The trial court's purported failure to consider Sinohue's eligibility for probation under section 1203.066, former subdivision (c)*

Sinohue contends that the trial court failed in its duty to consider whether he qualified for probation on the section 288, subdivision (a) counts (counts 1, 3, and 4). He argues that the court's failure to make this determination undermines his entire sentence, in that he could not have been sentenced under the One Strike law if he *qualified* for probation, even if the court declined to actually *grant* probation.

a. *Sentencing under the One Strike law*

Section 667.61, the One Strike law, provides that a defendant must be sentenced to an indeterminate life sentence when he or she has been convicted of an enumerated sex offense specified in section 667.61, subdivision (c), under one or more of the circumstances enumerated in subdivisions (d) or (e) of the statute. (See *People v. Wutzke* (2002) 28 Cal.4th 923, 930.) If the defendant is convicted of a section 667.61, subdivision (c) offense and one subdivision (e) circumstance exists, he or she must be sentenced to life in prison and is ineligible for parole for 15 years. (*People v. Wutzke, supra,* at p. 930.) One of the crimes enumerated in section 667.61, subdivision (c) is violation of section 288, subdivision (a), commission of a lewd act on a child under 14 years old. (§ 667.61, former subd. (c)(7).) One of the subdivision (e) circumstances is that the defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim. (§ 667.61, former subd. (e)(5).) The jury here convicted Sinohue of violating section 288, subdivision (a) in counts 1, 3, and 4, and found the multiple victim allegation true.

Until 2006, section 667.61 provided that the One Strike law applied to violations of section 288, subdivision (a) "unless the defendant qualifies for probation under subdivision (c) of Section 1203.066." (See § 667.61, former subd. (c)(7); *People v. Wutzke, supra,* 28 Cal.4th at p. 930.) In 2006, the Legislature amended section 667.61 to eliminate the probation qualification language. After the 2006 amendment, which took effect on September 20, 2006, any violation of section 288, subdivision (a) is a covered

offense, regardless of whether the defendant "qualified" for probation. (See § 667.61, subd. (c)(8); Stats. 2006, ch. 337, § 33.)

b. *Probation eligibility under section 1203.066*

The version of section 1203.066 in effect in 1998 and 1999,[4] when Sinohue committed the offenses against victim J.K., provided in pertinent part: "(a) Notwithstanding Section 1203 or any other law, probation shall not be granted to . . . any of the following persons: [¶] . . . [¶] (7) A person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim. [¶] (8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age. [¶] (9) A person who, in violating Section 288 or 288.5, used obscene matter, as defined in Section 311, or matter, as defined in Section 311, depicting sexual conduct, as defined in Section 311.3." Sinohue's jury found each of these circumstances true.

However, section 1203.066, subdivision (c) provided that paragraphs (7), (8), and (9) of subdivision (a) "shall not apply when the court makes all of the following findings:

> "(1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household.
>
> "(2) A grant of probation to the defendant is in the best interest of the child.
>
> "(3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence.
>
> "(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. . . .

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[4] Unless otherwise stated, further references to section 1203.066 are to the version in effect in 1998. We assume, without deciding, that the 1998 version of section 1203.066 is applicable here.

"(5) There is no threat of physical harm to the child victim if probation is granted."

Section 1203.066, subdivision (c)(5) further provided: "The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so. The court shall state its reasons on the record for whatever sentence it imposes on the defendant."

Thus, Sinohue was presumptively ineligible for probation unless he demonstrated eligibility under section 1203.066, subdivision (c). The "Legislature has declared that imprisonment is the normal sentence" for a defendant when a circumstance in section 1203.066, subdivision (a)(7), (8), or (9) applies. (*People v. Groomes* (1993) 14 Cal.App.4th 84, 88-89.) "Only when a defendant can establish he or she meets *all* the criteria of subdivision (c) of section 1203.066 can probation be ordered." (*Id.* at p. 89; *People v. Wutzke, supra,* 28 Cal.4th at p. 932.) The defendant has the burden to present evidence showing he is entitled to consideration for probation under section 1203.066, subdivision (c). (*People v. Groomes, supra,* at p. 89; *People v. Lammey* (1989) 216 Cal.App.3d 92, 98.) Under the plain terms of the statute, even if the court finds all five section 1203.066 requirements have been established, it is not required to grant probation. (*People v. Wutzke, supra,* at p. 932, fn. 7, 942.) A trial court has broad discretion to grant or deny probation, and its decision denying probation will be reversed "only upon a clear showing that the court exercised its discretion in an arbitrary or capricious manner." (*People v. Groomes, supra,* at p. 87.)

c. *Sinohue's contentions*

Sinohue argues that he presented sufficient evidence from which the trial court could have concluded each of the five section 1203.066, subdivision (c) requirements were met, and therefore he "qualified" for probation within the meaning of section 667.61, former subdivision (c)(7). If the trial court made such findings, he avers, the One Strike law could not have applied to the section 288, subdivision (a) offenses in counts 1, 3, and 4. The only circumstance bringing his crimes within the One Strike law's purview was the multiple victim circumstance specified in section 667.61, former

subdivision (e)(5): "The defendant has been convicted in the present case or cases of committing an *offense specified in subdivision (c)* against more than one victim." (Italics added.) Sinohue argues that, if he qualified for probation, the section 288, subdivision (a) offenses were not ones specified in section 1203.066, subdivision (c); the multiple victim circumstance was therefore inapplicable; and as a result, he could not be sentenced under the One Strike law on any of the counts. Sinohue acknowledges that the trial court was unlikely to actually grant probation even if it found he qualified under section 1203.066. However, in his view, based on the statutory language, the relevant question for purposes of section 667.61, former subdivision (c)(7) is not whether he was actually granted probation, but whether he "qualified" for probation. He contends that the trial court did not consider his eligibility for probation and expressly declined to make any findings on the question, thereby violating his due process rights. He urges that remand is required to allow the trial court to determine whether he was qualified for probation.

d. *Discussion*

(i) *Forfeiture*

Sinohue's contentions fail for a variety of reasons. First, Sinohue's contention that he was qualified for probation on counts 1, 3, and 4, and his related challenge to One Strike sentencing on counts 1 through 4, have been forfeited. Sinohue did not argue in his first appeal that counts 1, 3, and 4 were not within the One Strike law's ambit because he qualified for probation. "[W]hen a criminal defendant could have raised an issue in a previous appeal but did not do so, the defendant may be deemed to have waived the right to raise the issue in a subsequent appeal, absent a showing of good cause or justification for the delay." (*People v. Senior* (1995) 33 Cal.App.4th 531, 533, 538.) The factual predicates upon which Sinohue's arguments are based were available when he brought his first appeal. (See *id.* at p. 538.) "There being no reason why defendant 'should get "two bites at the appellate apple," ' [citation], we deem defendant's claim of error to be waived." (*Ibid*.)

Sinohue attempts to justify his failure to raise the probation qualification issue in his first appeal on the ground that the contention had, at that point, been forfeited because

trial counsel had failed to raise it at sentencing. But if Sinohue's contentions were forfeited for purposes of the first appeal, it is difficult to see how they have somehow been revived at this juncture. Sinohue suggests the claim was "preserved for this appeal" because defense counsel raised it on remand. Not so. At resentencing, defense counsel did not argue that One Strike sentencing was inapplicable to counts 1, 3, and 4 because Sinohue was qualified for probation. The defense sentencing memorandum addressed count 5, and count 5 only. Defense counsel argued in the memorandum that Sinohue was "eligible for probation *on count 5*," and that "If Mr. Sinohue will not be granted probation *on count 5* or a concurrent sentence with count 2 on count 5 then he should be sentenced to the low term of 6 years *on count 5*." (Italics added.) The same was true at the hearing: the court and parties discussed resentencing as to count 5 only. Contrary to Sinohue's argument, defense counsel did not make a "motion" to consider whether the section 288, subdivision (a) convictions "constituted qualifying convictions under section 667.61." Defense counsel did not, at any point, suggest that any other count should be resentenced or that Sinohue's qualification for probation undercut the applicability of the One Strike law.

Sinohue points out that a trial court may reconsider the entire sentence when a case is remanded for resentencing on a single count. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 ["trial courts are . . . afforded discretion by rule and statute to reconsider an entire sentencing structure in multicount cases where a portion of the original verdict and resulting sentence has been vacated by a higher court"]; *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1552; *People v. Hill* (1986) 185 Cal.App.3d 831, 834.) But this precept does not assist Sinohue. Here, we did not vacate any portion of the original verdict, and remanded for resentencing on count 5 only. " 'On remand with directions, after a judgment on appeal, the trial court has jurisdiction only to follow the directions of the appellate court; it cannot modify, or add to, those directions.' [Citation.]" (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 441-443 [rejecting claim that trial court abused its discretion by failing to complete a " 'full sentencing analysis' " on remand when appellate court reversed sentence on one count].) In any event, here the

trial court did not choose to reconsider the entire sentence, or any other count; the sentences on counts 1 through 4 remained unchanged.

(ii) *The trial court did not refuse to make findings on probation eligibility*

In any event, Sinohue's contentions fail on the merits. Sinohue contends the trial court "refused" to consider whether he had established the five criteria in section 1203.066, subdivision (c)(1) through (5), and therefore failed to consider his eligibility for probation, thereby depriving him of due process. He is incorrect. The defense sentencing memorandum argued Sinohue was eligible for probation on count 5 because he satisfied each of the five criteria listed in section 1203.066, subdivision (c). The probation report, which was attached to the sentencing memorandum, also addressed several of the section 1203.066, subdivision (c) criteria, but concluded Sinohue was ineligible for probation. The trial court stated it had received and reviewed the defense sentencing memorandum. At the sentencing hearing, defense counsel asked the trial court to expressly state whether it found Sinohue qualified for probation under section 1203.066. The court replied, "I'm not making any of the findings that would take it out of the section that indicates that probation shall not be granted for the offenses." Thus, it is clear the trial court was aware it could grant probation if the requisites of section 1203.066, subdivision (c) were satisfied; did consider the five section 1203.066, subdivision (c) criteria; and determined Sinohue did not satisfy one or more of them.

Sinohue's argument to the contrary is based on a misreading of the record. He interprets defense counsel's and the trial court's comments that the court was "not making findings" to mean the trial court refused to consider the issue. But the cited comments did not suggest the court was refusing to consider whether section 1203.066 applied. Instead, using the language of the statute – that paragraphs 7 through 9 did not apply "*when the court makes all of the following findings*" – the court simply indicated it found Sinohue failed to satisfy the five section 1203.066, subdivision (c) criteria. In short, the court found Sinohue was statutorily ineligible for probation, and declined to make the findings required by section 1203.066, subdivision (c)(1) through (5), to bring him within the statutory exception. (See *People v. Groomes, supra,* 14 Cal.App.4th at

p. 87.) The colloquy between the court and defense counsel, which we quote in the margin, illustrates this point.[5]

To the extent Sinohue complains that the trial court erred by failing to specify which of the five criteria had not been met, or further describe the basis for its ruling, any challenge has been forfeited. It is settled that a " 'party in a criminal case may not, on appeal, raise "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" if the party did not object to the sentence at trial. [Citation.] The rule applies to "cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, *or failed to state any reasons or give a sufficient number of valid reasons*. . . ." ' " (*People v. Scott* (2015) 61 Cal.4th 363, 406, italics added; *People v. Boyce* (2014) 59 Cal.4th 672, 730-731; *People v. Gonzalez* (2003) 31 Cal.4th 745, 751; *People v. Scott* (1994) 9 Cal.4th 331, 356.) As our recitation of the colloquy between the court and defense counsel

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[5] Defense counsel stated that Sinohue wanted counsel "to specifically ask the court, if [probation] was denied, to make any findings" under section 1203.066. Counsel continued: "I believe you did because, if you made those findings – well, I guess you could make the findings, and he would [be] eligible for probation, and it would be up to you if you gave it to him. That would be under the 1998 version. [Under the 1998 statute], there's findings, and I think the court's not making them, but if it is, one way or the other, at least ruling on it, that would be sub (c) paragraphs 1 through 5, and I think I addressed it in my memo, too." The trial court replied, "Right. Give me a moment." Defense counsel clarified that he was referring to section 1203.066, and explained, "There's a sub (c) paragraph 7, 8, 9 will not apply if the court makes the following findings, and there's five different findings the court could make. I'm assuming by your – well, I'll let you decide if you're making any of those findings, Your Honor. " After the trial court examined the statute, the following discussion transpired:

"The Court: [W]hat I'm doing is finding – I'm not making any of the findings that would take it out of the section that indicates that probation shall not be granted for the offenses. [¶] But . . . I think I've made clear my reasons why –

"[Defense counsel]: No. No. It wasn't so much making clear the reasons, just that that's what you had done for the record.

"The Court: Yes, I don't think probation is appropriate, and I've given my views on that, as well. [¶] . . . [¶]

"[Defense counsel]: Thank you very much for your consideration, Your Honor."

demonstrates, when the trial court suggested it had already stated the reasons why probation would be denied, defense counsel indicated further clarification was unnecessary.

(iii) *The trial court did not abuse its discretion by finding Sinohue was statutorily ineligible for probation under section 1203.066*

Further, even if the trial court had erred by failing to consider Sinohue's eligibility for probation under section 1203.066 or explain the basis for its findings, any error was "harmless because appellant failed to prove his eligibility for probation" under the provisions of section 1203.066, subdivision (c). (See *People v. Lammey, supra,* 216 Cal.App.3d at pp. 94-95; cf. *People v. McLaughlin* (1988) 203 Cal.App.3d 1037, 1040.)

In count 1, Sinohue was convicted of committing a lewd act on victim D.L. in November 2008. As noted, in 2006 the Legislature amended section 667.61 to make violation of section 288, subdivision (a), a One Strike offense without regard to whether the defendant was qualified for probation under section 1203.066. (See Stats. 2006, ch. 337, § 33.) Thus, whether or not Sinohue was qualified for probation, his crime in count 1 is a "One Strike" offense. Moreover, Sinohue failed to offer any evidence whatsoever showing that a grant of probation would be in victim D.L.'s best interest. He therefore failed to meet his burden to establish the existence of all the criteria under section 1203.066, subdivision (c). (*People v. Groomes, supra,* 14 Cal.App.4th at p. 89; *People v. Lammey, supra,* 216 Cal.App.3d at p. 98.)

In counts 3 and 4, Sinohue was convicted of committing lewd acts on victim J.K. during the summer of 1998. Again, Sinohue failed to present sufficient evidence to support a finding that a grant of probation would be in the best interests of the child. The People argue that under *People v. Wills* (2008) 160 Cal.App.4th 728, Sinohue could not prove the best interest criterion as to victim J.K. because J.K. was an adult at the time of trial. In *Wills,* the appellate court held that "under former section 1203.066, subdivision (c) a sentencing court has no authority to grant probation to a defendant . . . in a case in which the molestation victim is no longer a child at the time of sentencing."

(*Id.* at p. 732.) The court reasoned that, based on the plain language of section 1203.066, a sentencing court is unable to make a finding that a grant of probation is in the best interest of the child "for the simple reason that there is no child. In such a case, the sentencing court is unable to make 'all' of the findings specified in former subdivision (c) of section 1203.066, as required by that subdivision, and thus is not authorized to grant probation . . . ." (*People v. Wills, supra,* at pp. 737-738.) Sinohue contends that *Wills* was wrongly decided and invites this court not to follow it. We decline the invitation.

But, apart from *Wills,* the fact remains that Sinohue did not present sufficient evidence from which the trial court could have concluded probation was in the best interest of J.K. On remand, in his sentencing memorandum, Sinohue argued that J.K. stated, at the original sentencing hearing, that it was not his role to "say what should be done" with Sinohue; he was not ready to forgive him; and he recognized that Sinohue was suffering from a "sickness." Defense counsel made the same argument at the hearing and added that J.K. had been undergoing therapy. Based on this, Sinohue argued a grant of probation would be in J.K.'s best interest. This conclusion does not follow from the argument and "evidence" presented. Simply put, that J.K. was undergoing therapy,[6] understood Sinohue suffers from a sickness, and has not forgiven him does not constitute *any* evidence that it would be in J.K.'s best interest to grant probation. Sinohue failed to meet his burden to satisfy the requirements of section 1203.066, subdivision (c), and thus could not have been found qualified for probation.[7] (See *People v. Wutzke, supra,* 28 Cal.4th at p. 932.)

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[6] The defense presented no evidence to show J.K. was participating in therapy, but we assume arguendo counsel's assertion was correct.

[7] Indeed, the only evidence before the trial court suggested that probation was clearly *not* in the victims' best interests. The probation report concluded that probation was not in the best interests of the victims. J.K.'s statements at the initial sentencing hearing do not remotely indicate he believed granting probation would be in his or D.L.'s best interests. J.K.'s mother opined that Sinohue was a "bad man with an incurable disease" who "need[ed] to go to jail for the rest of [his] life." She opined that Sinohue had "stalked [her] children" and threatened J.K.'s girlfriend, and had "no doubt that [Sinohue's] victims and their families will never be safe" if he was ever released from

Sinohue attempts to avoid this conclusion by arguing that the "trial court prevented" him from presenting sufficient evidence regarding probation eligibility. He posits that his "motion" was but a "starting point," and it is likely "other relevant information would have been presented to the trial court in a hearing," had the court "not dismissed the issue without further consideration." This argument seriously mischaracterizes the record. The trial court never precluded Sinohue from presenting evidence at the resentencing hearing. Sinohue never sought an evidentiary hearing and never sought to produce evidence on the probation eligibility question.

2. *Dual use of facts*

Sinohue next asserts that the trial court violated the prohibition on dual use of facts by relying on a factor that was an element of the charged offense to impose the high term on count 5. He avers that this purported error was a violation of due process, and the matter must be remanded for resentencing. We disagree.

The trial court explained its selection of the high term as follows: "The defendant took advantage of a position of trust for both victims in molesting them. And it was very apparent from . . . the trial and the testimony he damaged the victims and tore apart their families . . . . He carried out the offenses with careful planning and calculation over a lengthy period of time, which is very clear from the evidence. The victims were of young age, obviously, and were particularly vulnerable, and he took advantage of that. They were actually put into his care a number of times, and he took advantage again of that position of trust. And he has failed to accept responsibility."

As the People point out, Sinohue has forfeited his claim that the trial court violated the proscription on dual use of facts because he made no objection on this ground below. (See *People v. Scott, supra,* 9 Cal.4th at p. 356.) However, because Sinohue contends his

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prison. D.L. stated that he believed Sinohue should have "the most time in prison because as long as he's in prison then there's one less bad person who is [on] the streets," and he had hurt D.L. and J.K. as well as many others. Nothing about the comments made at sentencing supported a finding probation would have been in the victims' best interests.

counsel provided ineffective assistance by failing to object, we consider the merits of his contention.

"In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (Cal. Rules of Court, rule 4.420(b).) A trial court has broad discretion in selecting the appropriate sentence, and we review its decision for abuse. A trial court abuses its discretion when its decision is irrational or arbitrary, or when the court relies on circumstances that are irrelevant to the decision or otherwise constitute an improper basis for the decision. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Carmony* (2004) 33 Cal.4th 367, 377.) The burden is on the party attacking the sentence to clearly show the sentencing decision was irrational or arbitrary. (*People v. Carmony*, at p. 376; *People v. Jones* (2009) 178 Cal.App.4th 853, 861.)

Although a single fact may be relevant to more than one sentencing choice, the dual or overlapping use of sentencing factors is prohibited in a variety of circumstances. (*People v. Scott, supra*, 9 Cal.4th at p. 350; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1197.) A fact that is an element of a crime upon which sentence is imposed may not be used to impose a greater term. (*People v. Scott*, at p. 350; *People v. Moberly*, at p. 1197; Cal. Rules of Court, rule 4.420(d).)

Sinohue contends that since an element of section 288.5 is that the victim is under 14 years of age, the trial court could not find the victims' vulnerability was an aggravating factor, at least to the extent the vulnerability finding was based upon their ages. (See, e.g., *People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 195 ["Generally, where the victim's age is an element of the offense, the court may not cite the victim's vulnerability due to being

that age as a reason to impose the aggravated term"]; *People v. Flores* (1981) 115 Cal.App.3d 924, 927.)

The flaw in Sinohue's argument is that the vulnerability finding was not solely based on the victims' ages. Instead, the court found the victims were vulnerable because, in addition to their ages, they had been repeatedly left in Sinohue's care, allowing him to abuse his position of trust. When the record reveals circumstances in addition to age that made a victim particularly vulnerable, there is no improper dual use of facts. (*People v. Alvarado, supra*, 87 Cal.App.4th at p. 195.) In regard to an argument similar to Sinohue's, *Quintanilla* explained: "we understand the court's reference to the victim's youth as part of its vulnerability and abuse of trust rationale: Defendant exploited the cordial relationship he had built up over years, as a friendly neighbor and father of [the victim's] friend," in approaching the victim in a parking lot where he raped her. "There was nothing improper in finding such actions to be an aggravating factor." (*People v. Quintanilla, supra,* 170 Cal.App.4th at p. 413; see also *People v. Alvarado,* at p. 195 [the victim was not only 81 years old, but also lived alone; the trial court "could reasonably, and properly, rely on the *combination* of these facts to find that the victim was particularly vulnerable"]; *People v. Estrada* (1986) 176 Cal.App.3d 410, 418 [trial court did not err by imposing an aggravated term based on victim vulnerability even though the victim's minority was an element of the offense; she was not only young, but was shy, withdrawn, and small in stature]; cf. *People v. Flores, supra,* 115 Cal.App.3d at p. 927 [trial court improperly considered the victim's vulnerability as a sentencing factor where the vulnerability finding was based solely on the victim's age].)

Moreover, even if the trial court had erred, Sinohue has failed to show any prejudice. It is settled that imposition of the upper term may be based upon a single aggravating factor. (*People v. Black* (2007) 41 Cal.4th 799, 815; *People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Jones, supra,* 178 Cal.App.4th at p. 863, fn. 7; *People v. Quintanilla, supra*, 170 Cal.App.4th at p. 413.) In addition to the vulnerability factor, the trial court cited, inter alia, Sinohue's abuse of trust and that the crimes were calculated and planned over time. (See Cal. Rules of Court, rule 4.421(a)(8) & (11).)

Thus, even absent vulnerability, the facts supported imposition of the upper term on count 5. Because Sinohue cannot show prejudice, his contention that defense counsel provided ineffective assistance fails. (See *People v. Homick* (2012) 55 Cal.4th 816, 893, fn. 44 [to establish ineffective assistance, a defendant must show counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, a more favorable determination would have resulted; if the defendant makes an insufficient showing on either component, the claim fails].)

Sinohue argues that, had the trial court realized it could not rely on the vulnerability factor, it might have imposed a lesser term, and therefore remand is required despite the existence of other factors supporting the court's sentencing choice. We disagree. As explained in *Alvarado*: "[A] remand would be unnecessary even if it were error to cite the victim's age. Given the numerous other circumstances that rendered her vulnerable, we do not find it reasonably probable the court would reach a different conclusion in finding the victim vulnerable or imposing an aggravated term." (*People v. Alvarado*, *supra*, 87 Cal.App.4th at pp. 195-196; *People v. Osband*, *supra*, 13 Cal.4th at p. 728 [improper dual use of facts does not necessitate resentencing if it is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error].) The same is true here.

3. *Custody credits*

The parties agree that the trial court should have calculated Sinohue's actual custody credits, and suggest a limited remand to the trial court for this purpose is appropriate. We agree that the trial court should have made the calculation, but conclude the omission can be more expeditiously cured by modification of the abstract of judgment rather than remand.

At the resentencing hearing the trial court stated that from the date of the prior sentencing until the date of the resentencing, Sinohue had accrued 1,550 days of actual custody credit. Defense counsel observed that Sinohue had been in custody since the date of his arrest, December 8, 2009, and his actual custody credits, from the date of his arrest to the date of resentencing, were 1,834 days. The trial court, on the other hand,

calculated that Sinohue was entitled to 2,200 actual days from the date of arrest until resentencing. The court opined that the "final calculation of all credits is done by the Department of Corrections and Rehabilitation." Defense counsel concurred, stating that "Ultimately, the Department of Corrections will figure it out . . . ." The trial court stated it would "keep my calculations as is, for now," meaning, apparently, it intended to leave unchanged the credit calculation applicable at the original sentencing. The abstract of judgment prepared upon resentencing stated the same calculation of actual and presentence custody credits as had the original abstract: 650 actual days and 98 days of local conduct credit, for a total of 748 days.

People v. Buckhalter (2001) 26 Cal.4th 20, considered whether, when a matter is remanded for resentencing, the trial court must recalculate custody and conduct credits. (*Id.* at p. 23.) The court concluded: "When, as here, an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the 'subsequent sentence.' [Citation.] On the other hand, a convicted felon once sentenced, committed, and delivered to prison is not restored to presentence status, for purposes of the sentence-credit statutes, by virtue of a limited appellate remand for correction of sentencing errors. Instead, he remains 'imprisoned' [citation] in the custody of the Director 'until duly released according to law' [citation], even while temporarily confined away from prison to permit his appearance in the remand proceedings. Thus, he cannot earn good behavior credits under the formula specifically applicable to persons detained in a local facility . . . ." (*Ibid.*) Although such a defendant is "not entitled to additional good behavior credits as a presentence detainee," the trial court is required to recalculate and credit the actual time defendant served on his sentence prior to its modification. (*Ibid.*)

Applying *Buckhalter* here, the trial court should have calculated Sinohue's days of *actual custody* served prior to resentencing. Sinohue avers he has accrued a total of 1,835 actual days in custody. This calculation appears correct. Sinohue had been in custody since the date of his arrest on December 8, 2009. Initial sentencing transpired on

September 19, 2011. Sinohue was resentenced on December 16, 2014. Based upon these dates, Sinohue was entitled to 24 days for 2009, 365 days for 2010, 365 days for 2011, 366 days for 2012 (a leap year), 365 days for 2013, and 350 days for 2014, for a total of 1,835 days.[8] (See *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48 [calculation of custody credit begins on the date of arrest and continues through the date of sentencing].) "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) Accordingly, we order the judgment modified to reflect the correct credit calculation.

4. *Correction of abstract of judgment*

The People request correction of errors in the abstract of judgment. At sentencing, the trial court orally imposed a determinate, 16-year term on count 5, consecutive to the indeterminate term imposed on count 2. The abstract of judgment, however, indicates a sentence of 16 years to life on count 5, to be served concurrently with count 2. While not raised by the parties, we also observe that the abstract of judgment erroneously states all the crimes were committed in 2008.

"It is well settled that '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]' [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*People v. Jones* (2012) 54 Cal.4th 1, 89; *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.) We therefore order that the abstract of

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[8] Sinohue correctly points out that the original abstract of judgment incorrectly stated he was entitled to 650 days of actual credit and 98 days of presentence conduct credit, whereas the correct calculation was 651 days of actual credit and 97 days of presentence conduct credit. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1184 [sections 288.5 and 288, subdivision (a) are violent felonies subject to a 15 percent conduct credit limitation].) We agree, and order the presentence conduct credit amount corrected accordingly.

judgment be corrected to conform to the actual sentence imposed by the trial court on count 5, namely, a determinate term of 16 years, consecutive to count 2. The abstract should also reflect the years of the crimes as follows: count 1, 2008; count 2, 2008-2009; count 3, 1998; count 4, 1998; and count 5, 1998-1999.

DISPOSITION

The judgment is modified to reflect a determinate sentence of 16 years on count 5, to be served consecutive to the sentence imposed on count 2, and 1,835 days of actual custody credit and 97 days of presentence conduct credit. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these changes as well as corrections to the dates of the offenses, as set forth herein, and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.